No. 93-2340

IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1991

STATE OF MICHIGAN,

Petitioner,

vs.

CLARISSA MARSH,

Respondent.

Supreme Court, U.S.
FILED
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PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

UNDER THIS COURT'S HOLDING IN MASSIAH V UNITED STATES, 377 US 201 (1964), DOES IT VIOLATE THE SIXTH AMENDMENT RIGHT TO COUNSEL FOR POLICE TO INTERVIEW AN INCARCERATED WITNESS IN THE ABSENCE OF COUNSEL ABOUT GIVING TESTIMONY AGAINST A CO-DEFENDANT IN THE SAME CASE, AFTER HER DIRECT APPEAL HAS RUN ITS COURSE AND A COLLATERAL ATTACK AGAINST HER OWN CONVICTION IN ANOTHER JURISDICTION HAS BEEN DISMISSED?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED.....i

INDEX OF AUTHORITIES.....v, vi

OPINIONS BELOW.....2

STATEMENT OF JURISDICTION.....3

CONSTITUTIONAL PROVISIONS INVOLVED....3

STATEMENT OF THE CASE.....5

REASONS FOR GRANTING THE WRIT.....12

CONCLUSION.....18

APPENDICES

"A" Trial Court ruling of October 30, 1989.....1a

"B" Michigan Court of Appeals Opinion of April 12, 1993.....9a

"C" Michigan Supreme Court Order of June 25, 1993.....13a

INDEX OF AUTHORITIES

CASE PAGE

Cahill v Rushen,
678 F2d 791 (CA 9, 1982).....15

Edwards v Arizona,
451 US 477; 101 S Ct 1880;
68 L Ed 2d 378 (1981).....15

Griffin v Illinois,
361 US 12; 76 S Ct 585;
100 L Ed 891; 55 ALR2d 1055 (1963).....14

Marsh v Richarson,
781 F2d 1201 (CA 6, 1986).....9

Massiah v United States,
377 US 201; 84 S Ct 1199;
12 L Ed 2d 246 (1964).....13

Michigan v Jackson,
475 US 625; 106 S Ct 1404;
89 L Ed 2d 631 (1986).....16

People v Berry,
384 Mich 270 (1974).....14

People v Gonyea,
421 Mich 462 (1984).....15

People v Green,
405 Mich 273 (1979).....15

People v Walter Martin,
Docket No. 78-07257.....6

Richardson v Marsh,
481 US 200; 107 S Ct 1702;
95 L Ed 2d 176 (1987).....9

Ross v Moffitt,
417 US 600; 94 S Ct 2437;
41 L Ed 2d 341 (1974).....14

COURT RULES

MCR 7.203.....13

MCR 7.301.....13

MCR 6.425(F)(1)(c).....14

OTHER AUTHORIES

Caminsky,
A Challenge to Miranda,
14 Search and Seizure L Rpt 145 (1987).16

Grano,
Prophylactic Rules in Criminal
Procedure: A Question of Article III
Legitimacy, 80 NWU L Rev 100 (1985)....16

STATUTES

1963 Const, Art I, sec 20.....13, 14

MCL 600.309; MSA 27A.309.....13

MCL 600.232; MSA 27A.232.....13

IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1991

STATE OF MICHIGAN,

Petitioner,

vs.

CLARISSA MARSH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

NOW COMES the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief of Research, Training and Appeals, and Jeffrey Caminsky, Assistant Prosecuting Attorney, and pray that a Writ of Certiorari issue to review the judgment of the Michigan Court of Appeals, entered in this cause on April 12, 1993, leave to appeal denied by the Michigan Supreme Court June 25, 1993.

OPINIONS BELOW

The ruling of the trial court suppressing Respondent's statement in the prosecution's case-in-chief is unreported, and appended below as Appendix A. The opinion of the Michigan Court of Appeals is unreported, and appended below as Appendix B. The order of the Michigan Supreme Court denying leave to appeal is unreported as yet, and appended below as Appendix C.

STATEMENT OF JURISDICTION

The trial court entered its order suppressing Respondent's statement in the prosecution's case-in-chief on October 30, 1989. Following interlocutory appeals by both parties, the Michigan Court of Appeals issued its opinion and judgment on April 12, 1993. The Michigan Supreme Court denied both parties leave to appeal on June 25, 1993. This Court's jurisdiction is invoked under 28 USC 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence."

Amendment XIV to the United States Constitution provides, in pertinent part:

"...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On May 2, 1979, the trial court sentenced Respondent to life imprisonment for two counts of first-degree murder, and one count of assault with intent to murder. Following appointment of the State Appellate Defender's Office as appellate counsel, the Michigan Court of Appeals affirmed Respondent's conviction on December 17, 1980 in an unpublished, per curiam opinion. (COA #46128). The Michigan Supreme Court denied Respondent's delayed application for leave to appeal on February 5, 1982, and denied Respondent's motion for reconsideration on April 30, 1982. During the course of these proceedings, the State Appellate Defender's Office still purported to represent Respondent.

On June 14, 1983, again through the State Appellate Defender's Office,

Respondent filed a Petition for writ of Habeas Corpus in the United States District Court. (ED Mich #83-CV-2665-DT).

On May 18, 1984, Respondent testified about certain facts relevant to the instant prosecution at an evidentiary hearing conducted in Detroit Recorder's Court, in the case of People v Walter Martin, Docket No. 78-07257.

On October 11, 1984, the Hon. Ralph Guy of the United States District Court issued an opinion and order denying Respondent's federal petition; Judge Guy denied Respondent's motion for Certificate of Probable Cause on November 15, 1984.

On June 4, 1985, Respondent gave the statement at issue in this Petition, during an interview with Sgt. James Harris of the Detroit Police Department. This interview

occurred at the Huron Valley Women's Correctional Facility, where Respondent was then in custody, and was reduced to written form and signed by Respondent. Also present was Joseph Koch of the Wayne County Prosecutor's Office. During the interview, nobody representing the State reminded Respondent of her constitutional rights, including her right against self-incrimination and her right to counsel; however, Officer Harris did inform her that she did not have to speak to him. During the course of the interview, Respondent indicated that she would testify for the prosecution in Walter Martin's upcoming trial. On June 7, 1985, the United States Court of Appeals for the Sixth Circuit granted Respondent's application for a certificate of probable cause, and ordered counsel appointed to represent her for the habeas appeal. (Docket No. 84-1777).

On July 2, 1985, the trial judge in the Martin case honored Respondent's assertion of her Fifth Amendment rights, permitting her to decline to testify for the prosecution. The fact of her refusal to testify, on advice of counsel, came as a surprise to the police and prosecution, because she had not indicated any unwillingness to testify until her appearance in court. The prosecution had discussed with defense counsel the possibility of Respondent's testifying for the People in exchange for some concessions, on or about February 1, 1985, but had come to no arrangements satisfactory to both sides. However, the prosecution had made no advance arrangements with counsel, prior to the June 4th interview.

On January 23, 1986, the Sixth Circuit reversed the District Court and remanded the

cause for entry of a writ of habeas corpus. Marsh v Richarson, 781 F2d 1201 (CA 6, 1986). On May 12, 1986, District Judge Barbara Hackett granted a conditional writ; on June 9, 1986, the United States Supreme Court granted Petitioner's petition for a writ of certiorari. (USSC #85-1433). On September 17, 1986, Judge Hackett granted Respondent's motion for personal bond. And on April 21, 1987, the Supreme Court reversed the Sixth Circuit's decision, and remanded the cause for further proceedings. Richardson v Marsh, 481 US 200; 107 S Ct 1702; 95 L Ed 2d 176 (1987). On March 23, 1988, Judge Hackett entered a final judgment granting the writ of habeas corpus, deeming itself bound to do so by this Court's holding on certiorari. On April 29, 1989, the Sixth Circuit dismissed Petitioner's appeal on procedural grounds of untimeliness, leading to the underlying

proceedings in the trial court. Docket No's 88-1464, 88-1606; reported at 873 F2d 129 (CA 6, 1989).

On October 30, 1989, during the course of ruling on pretrial procedural matters, Judge Edward M. Thomas of Detroit Recorder's Court granted in part Respondent's motion to suppress her statement of June 4, 1985. The court held that because the prosecutor's office knew of opposing counsel's involvement in the pending federal case, the police violated Respondent's Sixth Amendment right to counsel by interviewing her in prison during the pendency of her habeas case, and declined to receive the statement in the prosecution's case-in-chief; however, the court also ruled that as the statement was otherwise voluntary in all respections, he would admit the statement for purposes of impeachment.

Both parties having filed interlocutory appeals, the Court of Appeals granted both applications on January 17, 1990 and consolidated the cases. (COA # 122998, 122561). On April 12, 1993, the Court of Appeals affirmed the trial court's ruling in a short, unpublished opinion.

On June 25, 1993, the Michigan Supreme Court denied Petitioner's timely application for leave to appeal. Petitioner now seeks certiorari

REASONS FOR GRANTING THE WRIT

THE SIXTH AMENDMENT RIGHT TO COUNSEL DOES NOT EXTEND TO AN INCARCERATED PRISONER'S POST-TRIAL, POST-SENTENCING, POST-APPELLATE INTERVIEWS WITH THE POLICE.

This case presents a set of unique circumstances, and a novel case of first impression -- ie, whether the Sixth Amendment right to counsel prevents the police from interviewing a potential witness about testifying against a co-defendant, in a case in which her own state court appeals have run their course, and a federal habeas suit is pending on her own appeal in the Federal Court of Appeals. While Petitioner can find nothing on point, common sense suggests that one's right to counsel cannot extend further than one's right to appeal -- and that so long as the police do nothing to render the statement involuntary, nothing prevents them from initiating contact with a prison inmate whose own appeal of right has long since

passed. Moreover, given the widespread and routine use of federal habeas corpus proceedings as a second avenue of appeal, the relationship between federal habeas proceedings and pending state court litigation is a constant source of friction which this Court can ameliorate by drawing a careful distinction between an accused's right to counsel under the Sixth Amendment under Massiah v United States, 377 US 201; 84 S Ct 1199; 12 L Ed 2d 246 (1964), and a litigant's ability to retain counsel to pursue a private cause of action.

Under 1963 Const, Art I, sec 20 a state criminal defendant has an appeal of right to the Michigan Court of Appeals. Cf, MCL 600.309; MSA 27A.309, MCR 7.203. Compare, MCL 600.232; MSA 27A.232, MCR 7.301. Given this appeal of right, both state and federal law grant indigent defendants the right to appointed counsel, in order to prosecute

such an appeal. 1963 Const, Art I, sec 20; Griffin v Illinois, 361 US 12; 76 S Ct 585; 100 L Ed 891; 55 ALR2d 1055 (1963).

However, given the fact that the appointment of counsel constitutes the expenditure of public monies, the right to appointed appellate counsel extends no further than the right to appeal. Ross v Moffitt, 417 US 600; 94 S Ct 2437; 41 L Ed 2d 341 (1974); People v Berry, 384 Mich 270 (1974). Accordingly, state law limits the authority of appointed counsel to representing the indigent defendant in trial court postconviction proceedings, to litigating the matter in the Court of Appeals, and -- if counsel prevails in the Court of Appeals -- to responding to any application filed in this Court by the prosecution. MCR 6.425(F)(1)(c); prior citation, 6.101(J)(2).

In this case, Respondent had already prosecuted her appeal of right, and her conviction had become final long before she came to file habeas proceedings in federal court. Cf, People v Gonyea, 421 Mich 462 (1984); Cahill v Rushen, 678 F2d 791 (CA 9, 1982). Accordingly, she had no right to counsel under existing law, and the trial court erred in finding otherwise. Moreover, Michigan courts have held that whatever the ethical constraints against attorneys conversing with opposing parties, the mere fact of conferring with a party outside counsel's presence does not justify the exclusion of evidence, absent some independent constitutional violation. People v Green, 405 Mich 273 (1979). And as presence at interrogation is outside the core function of counsel, it was fundamental error of constitutional magnitude for the trial court to extend the prophylactic rules of Edwards v Arizona, 451 US 477; 101 S Ct 1880;

68 L Ed 2d 378 (1981) and Michigan v Jackson, 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986) to a case where the defendant's direct appeal had run its course, and a mere collateral attack was pending in a civil action in a different jurisdiction.[1]

In any event, in this matter there was no pending criminal case against Respondent when the police interviewed her -- the Sixth Circuit had not yet granted her the certificate of probable cause needed to proceed with her federal appeal, and had not yet appointed counsel. Moreover, the police were not parties to the pending civil

---

[1] In point of fact, there is also a substantial and unresolved question about the propriety of this Court requiring state courts to adhere to "prophylactic" rules which require the exclusion of evidence obtained under circumstances which do not violate the United States Constitution. See, eg, Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 NWU L Rev 100 (1985); Caminsky, A Challenge to Miranda, 14 Search and Seizure L Rpt 145 (1987).

litigation in Federal Court, placing Respondent and the police in the same posture as we would find them if Respondent were pursuing a separate cause of action for tort -- and, to the best of counsel's knowledge, there is no rule of law forbidding the police to talk to anyone who has hired an attorney for any reason under the sun, absent an affirmative invocation of some constitutional right. See, Cahill v Rushen, supra at 796-806 (Wallace, J, dissenting). Thus, it is difficult to understand how Respondent can claim a constitutional violation of any sort: whatever the Court may think of the tactics employed, Respondent could not, and cannot, point to any provision of the Constitution affording her the right to counsel at the time of her statement; and there can be no violation of a right which does not exist.

Accordingly, the trial court's ruling was in error, and this Court should reverse.

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant certiorari, reverse the holding of the Michigan Court of Appeals, and remand the cause for further proceedings.

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Dated: July 15, 1993
JC/eb

APPENDIX A

APPENDIX A

THE COURT: Thank you.

Based upon the testimony that was given by Ms. Marsh, she indicated that she did in fact speak to the officer voluntarily.

The concern that I have relative to the use of the statement as substantive evidence is predicated upon the argument that counsel made that she was pretty much caught in a trap in terms of her voluntarily talking to them. Her case has been reversed and she has to stand trial again, and then the statement taken from her, ostensibly, as a witness statement, would be used against her substantively. That just doesn't seem fair.

But, by the same token, this Court is of the opinion that an individual should not have the right to hide behind some

illusory type of shield to make statements that conflict with statements that were made at a previous time when that person thought they were going to be a witness and not a defendant.

That being the situation, this Court is of the opinion that, for impeachment purposes, the statement is admissible. At the time that she was interviewed, she was being interviewed as a witness, not as a defendant. She was being interviewed as a witness against a co-defendant, Kareem Martin.

And, that being the situation, the Court is of the opinion that the same rules relative to the advisement of rights and relative to the presence of an attorney really do not apply.

Under the circumstances, this Court is of the opinion that the statement should be suppressed as substantive evidence, and allowed for purposes of impeachment, in view of the fact that it was in fact a witness statement at the time it was taken.

MR. WHALEN: Thank you.

MR. SIMOWSKI: Thank you, Your Honor. Just one matter, Your Honor, because I'm sure this isn't going to be the end of this issue.

THE COURT: I would imagine not.

MR. SIMOWSKI: Because I think it's unique. Just for clarification purposes, did the Court find a Sixth Amendment violation, as far as -- since we were aware that Mr. Whalen was counsel, but did not notify him?

THE COURT: Based upon the use of the statement as substantive evidence, I say yes, there is a Sixth Amendment violation because of the fact that Mr. Koch was aware that Mr. Whalen id in fact represent Ms. Marsh. Ms. Marsh was also well aware of that fact and never asked for an attorney to be present.

The only conclusion that I can come to in that regard is the fact that she knew she had the right to counsel and the right to have her attorney present if she was going to make a statement that incriminated herself. She knew that she was making a statement as a proposed or prospective witness in the case of the People versus Kareem Martin, and that puts a different light on the statement in that regard, as far as this had the right to an attorney, she did not feel threatened or coerced or compelled to make a statement, and never for a moment thought that that

statement would be used against her substantively as any type of confession of her complicity the events that led to the death of Koran Knighton and Ollie Scott and the wounding of Koran Knighton's mother, Cynthia.

That being the situation, the Court is of the opinion that there wasn't any Sixth Amendment violation as it relates to the statement for impeachment purposes.

MR. WHALEN: Just one more thing, Your Honor. Although I'll have to give it some thought, there is a probability that I will take an interlocutory appeal on the issue of whether it can be used for impeachment. I don't know if Mr. Simowski -- what his intentions are with regard to the use of it as substantive evidence, but in the event that I do file a timely affidavit for interlocutory appeal, I would ask this Court

for a stay of proceedings pending a resolution by the Court of Appeals.

THE COURT: What is your position on that, Mr. Simowski?

MR. SIMOWSKI: Judge, I've been thinking about that. We have a trial date tentatively set of February 26th, 1990, and I thing that would be plenty of time for the Court of Appeals to resolve this issue -- at least the Court of Appeals. Now, what I'm afraid of on a motion to stay is that this case is already 11 years old, and if we wait until all the appeals are exhausted, that will take us to the year 2000, assuming it takes 11 years like the original appeal did.

I would ask the Court not to give a motion to stay. I think that our February 26th date will give us an indication by the Court of Appeals one way or another, and like

I said, this issue isn't going to rest with the Court of Appeals, anyway.

THE COURT: I'm not going to grant the stay. I recognize that you will probably file a motion for an interlocutory appeal, but I am not going to grant a stay.

Based upon my experience with the Court of Appeals, if they're going to grant one, they'll probably do it the day before trial, anyway. If I grant a stay, we wouldn't have a decision for the next six or seven months.

MR. WHALEN: Could I reserve the right to raise the motion again in the event that the Court of Appeals grants leave --

THE COURT: Yes.

MR. WHALEN: I will present an order.

THE COURT: Thank you both.

APPENDIX B

STATE OF MICHIGAN
COURT OF APPEALS

April 12, 1993

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v No: 122561

CLARISSA MARSH,
Defendant-Appellee.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee, No: 122998

v

CLARISSA MARSH,
Defendant-Appellant.

Before: Doctoroff, C.J., and Weaver and White, JJ.

PER CURIAM.

We have before us interlocutory appeals by both the State and defendant from a ruling on defendant's motion to suppress. The court's order on that motion ruled that the statement would not be admissible against her as substantive evidence, contrast with People v Green, 405 Mich 273, 274 NW2d 448

(1979), but was admissible for impeachment purposes. See People v Stacy, 193 Mich App 19; 484 NW2d 675 (1992). After reviewing the record and the issues and argument presented by both parties, we affirm the order.

/s/ Martin M. Doctoroff
/s/ Elizabeth A. Weaver

STATE OF MICHIGAN
COURT OF APPEALS

April 12, 1993

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

No: 122561

CLARISSA MARSH,
Defendant-Appellee.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

No: 122998

v

CLARISSA MARSH,
Defendant-Appellant.

Before: Doctoroff, P.J., and Weaver and White, JJ.

WHITE, J. (concurring).

I concur in the memorandum opinion because under the unique facts of this case, defendant's right to counsel was violated and therefore her statement cannot be used against her as substantive evidence. I agree that the statement can be used for impeachment purposes because it was not coerced by fear or threat of harm and was not induced by any promise or hope or reward or immunity.

/s/ Helene N. White

APPENDIX C

APPENDIX C

ORDER MICHIGAN SUPREME COURT

Entered: June 25, 1993

96482 & (86)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,
Cross-Appellee,

v

SC: 96484
COA: 122561; 122998
LC: 78-7257

CLARISSA MARSH,

Defendant-Appellee,
Cross-Appellant.

On order of the Court, the application for leave to appeal and the application for leave to appeal as cross-appellant are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

SEAL

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

June 25, 1993 Signed, Clerk

Supreme Court, U.S.
FILED
SEP 3 1993
OFFICE OF THE CLERK

NO. 93-234

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STATE OF MICHIGAN,

Petitioner,

-vs-

CLARISSA MARSH,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT OF INDIGENCY

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PROOF OF SERVICE

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NO. 93-234

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STATE OF MICHIGAN,

Petitioner,

-vs-

CLARISSA MARSH,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES Respondent, CLARISSA MARSH, through her attorney, R. STEVEN WHALEN, and asks this Honorable Court to permit her to proceed in forma pauperis, pursuant to Supreme Court Rule 39, for the following reasons:

1. On June 25, 1993, the Michigan Supreme Court denied leave to appeal to Petitioner, affirming a trial court order suppressing from evidence an out-of-court statement taken from Respondent. On August 10, 1993, Petitioner mailed a Petition for Writ of Certiorari challenging that decision. Counsel for Respondent received the Petition on or about August 12, 1993.

2. Respondent is indigent and cannot pay the costs of proceeding in this action, including answering, printing and reproducing a brief in opposition to petition for writ of certiorari under Supreme Court Rule 15, nor can she pay the costs of proceeding if certiorari is granted. **Respondent's affidavit is appended to this motion.**

3. Throughout the federal habeas corpus portion of this case, including review by this Court on a writ of certiorari, Respondent was provided with appointed counsel under the Criminal Justice Act, 18 U.S.C. sec. 3006A(d)(6). Specifically, Respondent sought and was permitted to proceed in forma pauperis, and counsel was appointed in the following Courts:

Federal District Court, Eastern District of Michigan, Docket No. 83-CV-2665-DT (Marsh v. Richardson);

United States Court of Appeals for the Sixth Circuit, Docket No. 84-1777 (Marsh v. Richardson, 781 F.2d 1201 (6th Cir. 1986), and Docket No. 88-1464 (Marsh v. Richardson, 873 F.2d 129 (6th Cir. 1989);

United States Supreme Court, Docket No. 85-1433 (Richardson v. Marsh, 481 U.S. 200 (1987).

4. Present counsel for Respondent represented her on a court-appointed basis at all of the above federal proceedings, and also in her original Michigan appeal by right. Although he was not court-appointed for the retrial, he agreed to represent her for a nominal fee, given the length of his association with Respondent and his familiarity with the case. Counsel also represented Respondent in her Michigan interlocutory appeals, which form the basis of the present petition, on a pro bono basis.

5. Respondent's Brief in Opposition to Petition for Writ of Certiorari is filed contemporaneously with this Motion.

WHEREFORE, Respondent CLARISSA MARSH asks this Honorable Court to permit her to proceed in forma pauperis. Respondent further asks that if a writ of certiorari is granted, attorney R. Steven Whalen, a member of the Supreme Court Bar, be appointed to represent her, pursuant to the Criminal Justice Act.

Respectfully submitted,

R. STEVEN WHALEN
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Suite 2833, Cadillac Tower
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(313) 964-0898

Dated: September 3, 1993

NO. 93-234

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STATE OF MICHIGAN,

Petitioner,

-vs-

CLARISSA MARSH,

Respondent

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, CLARISSA MARSH, being first sworn, say that I am the Respondent in the above-entitled case; and that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of defending the appeal are true.

1. Are you presently employed? No.

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

February 11, 1993. Approximately 1200 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Yes. From February of 1993 until the present time, I have received $226 per week in disability payments, due to an injury I received which makes me unable to work. I am not sure how long these payments will continue. I anticipate undergoing knee surgery in the near future.

3. Do you own any cash or checking or savings account?

Yes. I have a checking account with a balance of approximately $50.00.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes. I own a 1980 Chevrolet. The value is under $500.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

My two sons, Ronald and Sean, live at home with me. Sean works part-time.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Clarissa L Marsh

CLARISSA MARSH

Subscribed and sworn to before me
this 26th day of August, 1993.

Mary L Charlton

Notary Public

COMMISSION EXPIRES AUGUST 11,1994

NO. 93-234

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OCTOBER TERM, 1993

STATE OF MICHIGAN,

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-vs-

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of Authorities.....i

Counter-statement of Question for Review.....1

Constitutional Provisions Involved.....1

Counter-statement of the Case.....2

Summary of the Argument.....5

Argument

THE TRIAL JUDGE CORRECTLY SUPPRESSED RESPONDENT'S STATEMENT FROM USE AS SUBSTANTIVE EVIDENCE WHERE THE DEFENDANT WAS NOT GIVEN MIRANDA WARNINGS, WHERE THE POLICE INITIATED INTERROGATION FOLLOWING AT LEAST THREE REQUESTS FOR COUNSEL, WHERE DEFENDANT WAS ACTUALLY REPRESENTED BY COUNSEL, AND WHERE THE PROSECUTOR INTENTIONALLY FAILED TO NOTIFY COUNSEL OF THE INTERROGATION, ALL IN VIOLATION OF RESPONDENT'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.....6

Conclusion.....15

TABLE OF AUTHORITIES

CASES

Blyden v. Hogan, 320 F Supp 513 (SDNY, 1970) 13
Cahill v. Rushen, 678 F2d 791 (9th Cir. 1982) 8, 9
Carter v. McGinnis, 351 F Supp 787 (WDNY, 1972) 13
Cervantes v. Walker, 589 F2d 424 (9th Cir. 1978) 13
Counselman v. Hitchcock, 142 US 547, 35 L Ed 1110, 12 S Ct 195 (1892) 13
Edwards v. Arizona, 451 US 477, 68 L Ed 2d 378, 101 S Ct 1880 (1981) 14
Estelle v. Smith, 451 US 454, 68 L Ed 2d 359, 101 S Ct 1866 (1981) 7, 8, 9,12
Flittie v. Solem, 775 F2d 933 (8th Cir. 1985), cert den, 425 US 1025 (1986) 13
In re Gault, 387 US 1, 18 L Ed 2d 527, 87 S Ct 1428 (1967) 13
Marsh v. Richardson, 873 F2d 129 (6th Cir. 1989) . . . 2
Michigan v. Jackson, 475 US 625, 89 L Ed 2d 631, 106 S Ct 1404 (1986) 9
Mathis v. United States, 391 US 1, 20 L Ed 2d 381, 88 S Ct 1503 (1968) 13
Miranda v. Arizona, 384 US 436 (1966) 6,13
Richardson v. Marsh, 481 U.S. 200, 95 L.Ed.2d 176, 107 S.Ct. 1702 (1987) 2
Solem v. Stumes, 465 US 638, 79 L Ed 2d 579, 104 S Ct 1338 (1984) 14
United States v. Ash, 413 US 300, 93 S Ct 2568, 37 L Ed2 (1973) 8,9
United States v. Cassell, 452 F2d 533 (7th, 1971) . . . 13
United States v. Harrison, 265 F Supp 660 (SDNY, 1967) . 13

CONSTITUTIONAL PROVISIONS

Amendment V, U.S. Constitution 1,12-13

Amendment VI, U.S. Constitution 1,6,7

Amendment XIV, U.S. Constitution 1,14

COUNTERSTATEMENT OF QUESTION FOR REVIEW

DID THE TRIAL JUDGE CORRECTLY SUPPRESS RESPONDENT'S STATEMENT FROM USE AS SUBSTANTIVE EVIDENCE WHERE THE DEFENDANT WAS NOT GIVEN MIRANDA WARNINGS, WHERE THE POLICE INITIATED INTERROGATION FOLLOWING AT LEAST THREE REQUESTS FOR COUNSEL, WHERE DEFENDANT WAS ACTUALLY REPRESENTED BY COUNSEL, AND WHERE THE PROSECUTOR INTENTIONALLY FAILED TO NOTIFY COUNSEL OF THE INTERROGATION, ALL IN VIOLATION OF RESPONDENT'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V to the United States Constitution provides, in pertinent part:

> "No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..."

Amendment VI to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense."

Amendment XIV of the United States Constitution provides, in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

COUNTER-STATEMENT OF THE CASE

This case has a lengthy procedural history. Following habeas corpus review of Respondent's 1979 Recorder' Court conviction by the Federal District Court for the Eastern District of Michigan, review by the U.S. Court of Appeals for the Sixth Circuit, which ordered the writ granted, Marsh v. Richardson, 781 F.2d 1201 (6th Cir. 1986), review on writ of certiorari by the United States Supreme Court, which reversed the Sixth Circuit but remanded for further proceedings, Richardson v. Marsh, 481 U.S. 200, 95 L.Ed.2d 176, 107 S.Ct. 1702 (1987), review again by the District Court, which granted the writ, and a second review by the Sixth Circuit, which dismissed the Wayne County Prosecutor's appeal, Marsh v. Richardson, 873 F.2d 129 (6th Cir. 1989), Respondent's case was returned to the Recorder's Court for the City of Detroit for a new trial. Respondent, through the same attorney who represented her continuously since her first appeal by right in 1979, filed a motion to suppress a statement which was taken from her in 1985, when she was incarcerated.

On October 27 and October 30, 1989, an evidentiary hearing was conducted before Recorder's Court Judge Edward Thomas, regarding Respondent Clarissa Marsh's motion to suppress the statement taken from her on June 4, 1985. Detroit Police Sgt. James Harris testified that in preparing for the trial of Walter Martin[1], he

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[1] Three people were charged in the instant offense: Respondent Clarissa Marsh, Benjamin Williams and Kareem Martin. Marsh and Williams were tried jointly in 1979. Martin was not apprehended until after Defendant's trial, and was tried and convicted

asked Assistant Prosecutor Joseph Koch about the possibility of interviewing Respondent Marsh at the Huron Valley Women's Facility, and Koch replied, "Why not?" The next day, he and Koch went to the prison to question Respondent (T.I, 7-8).[2]

Sgt. Harris admitted that he did not give Respondent Miranda warnings before questioning her, and in fact told her that "I'm here now to talk to you as a witness and not as a suspect or defendant." (T.I, 9, 20-21).

Assistant Prosecutor Koch also admitted that no Miranda warnings were given. Koch also admitted that at the time of the interview, he was aware that Respondent Marsh was represented by counsel, and that some months prior to the interview (on or about February 1, 1985), he had talked with Respondent's lawyer about the possibility of Marsh testifying at the upcoming trial of Walter Martin. (T.II, 9-12). Defense counsel made it clear that his client would assert her Fifth Amendment rights and not testify at Martin's trial unless her conviction could be set aside and she could be given a favorable plea bargain. (T.II, 9-11). During the February conversation, Koch told Respondent's attorney that he was not willing to give Marsh any consideration for her testimony (T.II, 9-10). Koch was aware that Respondent was seeking a new trial through a habeas corpus action in federal court, and that the Wayne County

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separately in 1985.

[2] "T.I" refers to the evidentiary hearing transcript of October 27, 1989.
"T.II" refers to the evidentiary hearing transcript of October 30, 1989.

Prosecutor's Office was opposing counsel in that action (T.II, 11).

Assistant Prosecutor Koch also admitted that prior to the June 4, 1989 interrogation of Respondent, he did not notify defense counsel, and that he did not notify counsel when he had Respondent Marsh brought back to Detroit in July of 1985 to testify at Martin's trial (T.II, 10).

Portions of the Federal District Court file in Marsh v Richardson, No. 83-CV-2665-DT (ED Mich) were admitted into evidence at the suppression hearing, showing that Respondent had filed a motion for leave to proceed in forma pauperis in both Federal District Court and the Sixth Circuit Court of Appeals prior to the June 4, 1985 interrogation. Both of these pleadings were treated as requests for the appointment of counsel under the Criminal Justice Act. The District Court docket entries and transmission orders also indicated that attorney R. Steven Whalen was listed as attorney of record for Petitioner Marsh at all times from the commencement of the habeas action in 1983 until the final disposition by the Sixth Circuit in 1989, following a remand by the United States Supreme Court and a reconsideration by the District Court. Likewise, the Wayne County Prosecutor's Office was listed as counsel of record for the Respondent (T.II, 15-17).

On October 30, 1989, Judge Thomas ordered the suppression of Respondent's statement from use as substantive evidence at trial, specifically finding that Respondent was represented by counsel at the time the statement was taken, and that the prosecutor knew that Respondent was represented. The judge also found that the

Respondent fell into a trap when she was told that she was not being questioned as a suspect or a defendant, thereby being falsely led to believe that any statement she made would not be used against her (T.II, 37-39). Judge Thomas also ruled that the statement could be used for impeachment purposes only.

Both the prosecutor and the Respondent took interlocutory appeals to the Michigan Court of Appeals. The Court of Appeals granted leave to appeal to both parties and ordered a stay of proceedings. On April 12, 1993, the Court of Appeals, in an unpublished per curiam opinion, affirmed Judge Thomas' order in its entirety.

SUMMARY OF THE ARGUMENT

The Michigan courts correctly ruled that Respondent was denied her Sixth and Fourteenth Amendment right to counsel at a surreptitious custodial interrogation conducted by the police and an Assistant Wayne County, Michigan prosecutor. At the time of the interrogation, Respondent had requested counsel for state appellate proceedings, and subsequently requested counsel from both the United States District Court for the Eastern District of Michigan and the United States Court of Appeals for the Sixth Circuit, for the purpose of pursuing federal habeas corpus relief arising out of this case. In addition, Respondent was actually represented by counsel in federal habeas proceedings at the time of the interrogation, the Wayne County Prosecutor's Office was representing the State in this habeas proceeding, and the Assistant Wayne County Prosecutor who conducted the interrogation (without

notice to Respondent's lawyer) had been informed by Respondent's attorney that Respondent did not wish to make a statement or testify at the codefendant's trial unless she were offered some consideration.

The Respondent was also denied her rights under Miranda v. Arizona, 384 U.S. 436 (1966), and the Fifth and Fourteenth Amendments, where, prior to the custodial interrogation, Respondent was not only not advised of her Miranda rights, but was explicitly told that the police and the prosecutor were "here now to talk to you as a witness and not as a suspect or defendant," inferring that her statement would not be used against her.

ARGUMENT

THE TRIAL JUDGE CORRECTLY SUPPRESSED RESPONDENT'S STATEMENT FROM USE AS SUBSTANTIVE EVIDENCE WHERE THE DEFENDANT WAS NOT GIVEN MIRANDA WARNINGS, WHERE THE POLICE INITIATED INTERROGATION FOLLOWING AT LEAST THREE REQUESTS FOR COUNSEL, WHERE DEFENDANT WAS ACTUALLY REPRESENTED BY COUNSEL, AND WHERE THE PROSECUTOR INTENTIONALLY FAILED TO NOTIFY COUNSEL OF THE INTERROGATION, ALL IN VIOLATION OF RESPONDENT'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Sixth Amendment Violation

The Petitioner casts the issue as a unique question of first impression involving whether the Sixth Amendment right to counsel extends beyond a criminal defendant's direct appeal by right. Petitioner answers this question by stating that "so long as the police do nothing to render the statement involuntary, nothing prevents them from initiating contact with a prison inmate whose

own appeal of right has long since passed." Petition for Writ of Certiorari, pp. 12-13.

To the contrary, the facts of this case fall squarely within established Sixth Amendment jurisprudence. It is very important to note that this is not a case where a state prisoner's appeal by right has long passed, and no federal habeas corpus petition has been filed. Respondent recognizes that in some cases, years pass between the end of the state appellate process and the commencement of a federal habeas action. In the present case, however, Respondent had initiated a federal habeas action before the interrogation, she had requested counsel in both the District Court and the Sixth Circuit, she was actually represented by counsel, and the prosecuting agency which interrogated her was the counsel of record in the habeas case. Petitioner's concern about the possible Sixth Amendment rights of unrepresented prisoners who have not filed habeas petitions would be better addressed by this Court in a more factually appropriate case.

The Respondent's statement was obtained in violation of her right to counsel under the Sixth Amendment. The right to counsel extends to post-conviction proceedings. Estelle v. Smith, 451 U.S. 454, 68 L. Ed. 2d 359, 101 S. Ct. 1866 (1981).

In Cahill v. Rushen, 678 F.2d 791 (9th Cir. 1982), the Ninth Circuit ruled inadmissible a defendant's post-conviction and post-sentencing statement which the prosecutor introduced at retrial. Citing Estelle v. Smith, supra, 451 U.S. at 471, Cahill sanctioned a retrospective inquiry as to whether there was a right to counsel:

did the interview prove to be a critical stage of the proceedings at which counsel could have assisted the defendant? Judge Schroeder's reasoning in Cahill applies perfectly to the present case:

> "The decision of the Supreme Court in United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2 619 (1973), supports affirmance here, not reversal as contended by the State. That case held that a post-indictment photographic display for purposes of identification was not a "critical stage" of the prosecution such that defendant was entitled to the presence of counsel. The Court considered whether counsel could have been of much assistance to the defendant at the display and concluded he could not, contrasting the situation in Massiah, where "counsel could have advised his client on the benefits of the Fifth Amendment and could have sheltered him from the overreaching of the prosecution." Id. at 312, 93 S.Ct. at 2575. This situation is like Massiah, not Ash. We must look to the function of counsel and the role to be played at the event in question. As the Supreme Court has stated, the sixth amendment requires that counsel "be provided to prevent the defendant himself from falling into traps..." Id. at 316-317, 93 S.Ct. at 2577, quoting United States v. Bennett, 409 F.2d 888, 899-900 (2d Cir. 1969). Cahill fell into a trap. Even a brief consultation with his attorney would have corrected Cahill's erroneous impression that a confession at that point could have no adverse consequences.
>
> "The State nevertheless argues that the right to counsel which had attached at the time of indictment was cut off by the first conviction and sentencing, and was not resurrected until Cahill had been rearraigned. Under the State's theory there were in effect two separate prosecutions, and this interrogation occurred after the first had ended but before the second had begun. This mechanical view has no sound basis. We point out by way of analogy that under double jeopardy analysis, a second trial is viewed as a continuation of the original proceeding. At the time of the

> interview Cahill's conviction was not yet final, as subsequent developments demonstrated. 678 F2d at 794-795 (emphasis added)(footnotes omitted).

In the present case, the prosecutor's intent to use Respondent's statement at retrial clearly shows that the June 4, 1985 interview in the absence of counsel proved to be a critical stage of the proceedings against the Defendant. Id., Estelle v. Smith, supra. It is equally clear that had counsel been present at the interview, he "could have advised his client on the benefits of the Fifth Amendment and could have sheltered [her] from the overreaching of the prosecution." United States v. Ash, supra. Indeed, when Respondent finally did consult with her attorney after she was brought to Detroit to testify at Martin's trial, she asserted her Fifth Amendment right.[3]

Furthermore, this Court in Michigan v. Jackson, 475 U.S. 625, 89 L. Ed. 2d 631, 106 S. Ct. 1404 (1986), held that when a request for counsel is made, the police and prosecution are prohibited from initiating questioning with the defendant. Prior to the June 4, 1985 interview, the Respondent requested counsel at least three times. The first time was right after sentencing, when she requested and received the appointment of appellate counsel. The second time was when her attorney filed a motion for leave to

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[3] Petitioner claims that the prosecutor was surprised by Respondent's invocation of the Fifth Amendment. Petition for Writ of Certiorari, p. 8. This statement is puzzling, given the fact that prior to the clandestine interview, Respondent's attorney had plainly told the prosecutor that his client would not testify unless she were given some consideration, and the prosecutor stated his unwillingness to offer any consideration.

proceed in forma pauperis in Federal District Court, and the third time was when she filed the same request in the Sixth Circuit. The Federal Courts treat such a pleading as a request for the appointment of counsel under the Criminal Justice Act. The prosecution makes much of the fact that the Sixth Circuit Court of Appeals appointed counsel after the June 4th interview. However, under Jackson, it is the request for counsel, not the actual appointment which controls.

The prosecutor's almost unfathomable argument that the Respondent was not in fact represented by counsel is based on the fallacy that the right to appointed appellate counsel in Michigan circumscribes the state and federal constitutional right to counsel at what prove to be critical stages of the proceedings against a defendant. The Respondent's constitutional right to counsel does not depend on whether she had an absolute right to the appointment of counsel or what the scope of appointed counsel's duty entails. The trial judge correctly found that Respondent in fact was represented by counsel, and that the Wayne County Prosecutor's Office, as opposing counsel, was aware that she was represented. It is also an uncontested fact that Respondent requested the appointment of counsel prior to her interrogation.[4]

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[4] At the time of the 1985 interrogation, Defendant Marsh had filed a petition for writ of habeas corpus, had requested the appointment of counsel, and was in fact represented by counsel, all of which was known to the prosecutor. Thus, this case does not present the question of the extent of the Sixth Amendment rights of a convicted defendant who has exhausted state appeals, but has not filed a federal habeas corpus action and is not actually represented by counsel.

Also, this case does not involve the analogy to a defendant

The violation in the present case was especially egregious, since the prosecutor knew that Respondent was represented by counsel, and had been told that the Respondent would assert her Fifth Amendment rights and not testify at Martin's trial. The prosecutor's conduct in fact was a violation of Michigan Disciplinary Rule 7-104 of the Code of Professional Responsibility[5], which forbids a lawyer from communicating with an adverse party he knows to be represented by counsel "unless he has the prior consent of the lawyer representing such other party."

Nor can the prosecutor escape responsibility for his wanton violation of Respondent's right to counsel by claiming that the police were not parties to the pending civil litigation in Federal Court. The police are the agents of the prosecutor, and an assistant prosecutor accompanied Sgt. Harris to the prison where Respondent was questioned. Also, Sgt. Harris specifically asked the prosecutor if there would be any problem in questioning the Respondent; the prosecutor's reply was, "Why not?" Harris also

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who has initiated a separate tort action against the police, as suggested by the prosecutor. (Petition for Writ of Certiorari, pp. 16-17. The outcome of a successful tort case would be a money judgment against the police; the outcome of a successful federal habeas corpus action is the same as that of a successful direct appeal: a new criminal trial. The interrogation in this case was not a simple police-witness interview. It was approved and participated in by the same attorneys who represented the state in the habeas action, and who now prosecute the Defendant and propose to use the ill-gained statement against her.

[5] Adopted by order of the Michigan Supreme Court October 4, 1971, and applicable when Defendant was interrogated on June 4, 1985. The current rule on unauthorized communications, contained in Rule 4.2 of the Michigan Rules of Professional Conduct (effective 10-1-88) prevents prosecutors from talking to defendants without notice to defense counsel.

testified that if he had known Respondent was represented by counsel, he would not have interviewed her.

The judge's factual determination that Respondent was represented by counsel at the time she was interrogated, and that the prosecution knew this was based on uncontroverted evidence in the form of testimony and exhibits. Thus, the suppression of the statement on the basis of the prosecutor's wilful violation of the right to counsel was correctly affirmed by the Michigan courts.

Fifth Amendment and Miranda Violations

It is clear that at the time she was interrogated, Respondent was entitled to the protection of the Fifth Amendment. Sgt. Harris' statement that he was talking to Ms. Marsh as "a witness and not a suspect or defendant" is not controlling; if the result of the interrogation is the use of a statement to incriminate a defendant at a criminal trial, as the prosecutor in this case proposes, then the Fifth Amendment applies. Estelle v. Smith, 451 U.S. 454, 465, 68 L. Ed. 2d 359, 370, 101 S. Ct. 1866 (1981). This Court has held that "the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." In re Gault, 387 U.S. 1, 49, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967). This Court has also observed that the Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard." Counselman v. Hitchcock, 142 U.S. 547, 562, 35 L. Ed. 1110, 12 S. Ct. 195 (1892), quoted in Estelle v. Smith, supra, 68 L. Ed. 2d at 372.

The first problem is that the Respondent was not advised of her Miranda rights. Under the prophylactic rule set forth in Miranda v. Arizona, supra, the failure to inform a defendant of certain constitutional rights[6] prior to a custodial interrogation renders any of the defendant's subsequent statements inadmissible at trial.[7] Not only was the requisite advise of right omitted, but Sgt. Harris told the Respondent that he was not speaking to her as a defendant or a suspect, implying that any statement she made would not be used against her. Given these facts, the trial judge found that Respondent fell into a trap, in that she was falsely led to believe that her statement would not be used against her. This ruling was correct. Whether viewed as a Miranda violation or a Fourteenth Amendment Due Process violation, Respondent's statement must be suppressed.

Secondly, Respondent had in fact requested appellate counsel after her sentencing and during the federal court proceedings. Since Respondent had requested counsel, the police were absolutely prohibited from initiating any further questioning of her. Edwards

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[6] This advice includes the right to remain silent, the right to have an attorney present, and the warning that anything said can and will be used against the individual.

[7] Numerous cases have held that a defendant who is incarcerated on another charge is "in custody" for purposes of Miranda. Mathis v. United States, 391 U.S. 1, 20 L. Ed. 2d 381, 88 S. Ct. 1503 (1968); Flittie v. Solem, 775 F2d 933, 943, n. 17 (8th Cir. 1985)(en banc), cert den 425 U.S. 1025 (1986); United States v. Cassell, 452 F.2d 533, 540 (7th, 1971); Carter v. McGinnis, 351 F. Supp. 787, 792 (WDNY, 1972); United States v. Harrison, 265 F. Supp. 660, 662 (SDNY, 1967); Blyden v. Hogan, 320 F. Supp. 513, 519 (SDNY, 1970). Cf., Cervantes v. Walker, 589 F.2d 424 (9th Cir. 1978).

v. Arizona, 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981). Edwards established a bright-line rule, and once an individual has invoked the right to counsel, any subsequent conversation must be initiated by that individual. Solem v. Stumes, 465 U.S. 638, 79 L Ed. 2d 579, 104 S. Ct. 1338 (1984). Under Edwards, Respondent's statement must be suppressed.

Finally, the statement was involuntary as a matter of law. Apart from the inherently coercive pressures on a prison inmate and the absence of Miranda warnings, involuntariness may be presumed from the prosecutor's intentionally misleading implication that the Respondent's statement would not be used against her. The prosecutor and the police told Ms. Marsh that they were talking to her as a witness and not as a suspect, clearly implying that her statements would never be used against her. The prosecutor knew that she was actively pursuing a new trial in her federal habeas action, although he may have arrogantly assumed that she would not be successful. To her regret, the Respondent believed the prosecutor and the police, and she talked. As the trial judge in this case found, the Respondent fell into a trap by being falsely led to believe that any statement she made would not be used against her:

> "THE COURT: The concern that I have relative to the use of the statement as substantive evidence is predicated upon the argument that counsel made that she was pretty much caught in a trap in terms of her voluntarily talking to them. Her case has been reversed and she has to stand trial again, and then the statement taken from her, ostensibly, as a witness statement, would be used against her substantively. That just doesn't seem fair."

(Trial court's opinion from the bench. Petition for Writ of Certiorari, Appendix A).

Now, some five years later, the prosecutor's office--one of whose members took the stand and essentially admitted to a wilful violation of the rules of professional conduct-- proposes to use the statement against the Respondent. This type of duplicity is intolerable, and the prosecutor must not be rewarded with an evidentiary windfall. Under these circumstances, the Respondent's statement cannot be considered voluntary, and it was properly suppressed.

CONCLUSION

WHEREFORE, Respondent CLARISSA MARSH asks this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: September 3, 1993

NO. 93-234

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STATE OF MICHIGAN,

Petitioner,

-vs-

CLARISSA MARSH,

Respondent

PROOF OF SERVICE

R. STEVEN WHALEN, being first sworn, states that on September 3, 1993, he served attorney for Petitioner with a copy of Motion for Leave to Proceed In Forma Pauperis, Affidavit of Indigency and Brief in Opposition to Petition for Writ of Certiorari by depositing the same in a United States mailbox, with first-class postage prepaid, addressed to : Jeffrey Caminsky, Wayne County Prosecutor's Office, 12th Floor, 1441 St. Antoine, Detroit, MI 48226, and in a like manner mailed 12 copies of said pleadings to Clerk, Supreme Court of the United States, Washington, D.C. 20543.

R. STEVEN WHALEN

Subscribed and sworn to before me
this 3rd day of September, 1993.

Notary Public, Wayne County, MI
My commission expires:

MARY MELISSA BAKER
NOTARY PUBLIC - WAYNE COUNTY, MICH.
MY COMMISSION EXPIRES 09-24-96